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Supreme Court, U.S.
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No. 01-630

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2001

JESUSA MORALES,

Petitioner,

v.

THE P.F. LABORATORIES, INC.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Margaret Kleinman
Counsel of Record
318 Anderson Street
Hackensack, N.J. 07601
(201) 342-7738

15 pp

CORPORATE DISCLOSURE STATEMENT

Petitioner respectfully submits that Rule 29.6 of the Rules of the Supreme Court is not applicable to her.

QUESTIONS PRESENTED

1. Can the courts reject precedent under *Hines* and later cases and dismiss a falsely accused employee's complaint for wrongful discharge and breach of the Union's duty of fair representation under 12 (b) (6), notwithstanding that at arbitration, the Union unfairly and improperly deprived Morales and the arbitrator of overwhelming evidence of her innocence and the arbitrator concluded that the Union did not present any evidence?

2. Under notice pleading, when the claim is that the Union's omissions tainted the outcome of the arbitration, is the complaint sufficient if it alleged that the Union breached its duty at arbitration by failing to present favorable and exculpatory evidence, to her prejudice, and that a different result would have been obtained if the Union had "properly and fairly" represented her?

3. If the complaint was insufficient, was dismissal with prejudice the proper remedy?

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II. THE CASE APPEARS TO RAISE ISSUES OF FIRST IMPRESSION, I.E., WHAT EFFECT, IF ANY, DOES REPRESENTATION BY ATTORNEYS HAVE ON UNION LIABILITY FOR BREACH OF THE DUTY OF FAIR REPRESENTATION, AND WHETHER NEGLIGENCE CAN CONSTITUTE SUCH A BREACH.....3

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I. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THE SUPREME COURT PRECEDENT OF *HINES* AND OPINIONS FOLLOWING IT, THE CASE HAS BROAD IMPLICATIONS FOR EMPLOYEES, AND THE ISSUES WILL ARISE AGAIN

Respondents submit that Petitioner asks this court to review evidence, discuss facts, and correct error in a particular case (Resp. Opp. Br., at 2-3.) Contrary to these contentions, Petitioner requests review because the decision conflicts with the long-established precedent of *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S. Ct. 1048, 47 L.Ed.2d 231 (1976) and cases following it, in an area of law where "uniformity" is particularly paramount. *DelCostello v. International Brotherhood of Teamsters et. al.*, 462 U.S. 151, 1034 S. Ct. 2281, 76 L.Ed.2d. 476 (1983).

In attributing the result to non-actionable negligence, the decision deprives employees within the Third Circuit of judicial remedies when union conduct causes grievance mechanisms to fail. Such questions are recurring, and comparable issues are certain to arise again. *Watt v. Alaska*, 451 U.S. 259 (1981), at 274.

As argued in Petitioner's brief before the District Court, enforcement of finality provisions in collective bargaining agreements where the arbitrator has erred is conditioned on the union's "having satisfied its statutory duty" to fairly represent the employee. *Hines*, at 571.

The holding was designed specifically to avoid the circumstance that has resulted here, where

> "Wrongfully discharged employees would be left without jobs and a fair opportunity to secure an adequate remedy." *Id.*

Under 28 U.S.C.A. § 1254 (1), cases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. As amended in 1988, the Court will review cases when there is a conflict among circuits.

In labor cases, certiorari has been granted because of a contrariety of views in the courts. *Textile Workers Union of America v. Lincoln Mills of Ala.* 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed. 2d 972 (1957). The Court has also granted certiorari in cases of employee reinstatement. In *General Drivers, Warehousemen, and Helpers, Local Union No. 89 v. Riss & Co.* 372 U.S. 517, 83 S.Ct. 789, 9 L.Ed. 2d 918 (1963), the Court agreed to review a holding that the District Court had no jurisdiction over a suit for reinstatement, as had been ruled during the grievance procedure.

Apart from labor cases, the Court granted certiorari in a criminal matter where the District Court had apparently not considered potentially pertinent matters and the importance of a recent Supreme Court ruling. *Stutson v. U.S.*, 516 U. S. 193, 116 S.Ct. 600, 133 L.Ed. 2d 571 (1996).

Respondents also erroneously submit that Petitioner merely alleged that the union failed to make certain arguments and disagreements over tactics and strategy (Resp. Opp. Br., at 2-3.) First, the complaint primarily alleged that the union failed to submit exculpatory evidence

and present key witnesses. Moreover, Petitioner avoided making any allegations over tactics and strategy. Had she wanted to make such claims, she could have questioned, among other things, why the union called her to testify on the technical aspects of the experiment at issue.

Respondents also submit that the Petition does not enunciate in any way that the decision below departs from the accepted and usual course of judicial proceedings (Resp. Opp. Br., at 3.) However, the Petition does address how the ruling departed both procedurally and substantively from accepted practice under the controlling Supreme Court cases, *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S. Ct. 1048, 47 L.Ed.2d 231 (1976), *Czosek v. O'Mara*, 397 U.S. 25, 90 S.Ct. 770, 25 L.Ed.2d 25 (1970), and *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed. 2d 80 (1957) (Pet. , at 9-23.)

II. THE CASE APPEARS TO RAISE ISSUES OF FIRST IMPRESSION, I.E., WHAT EFFECT, IF ANY, DOES REPRESENTATION BY ATTORNEYS HAVE ON UNION LIABILITY FOR BREACH OF THE DUTY OF FAIR REPRESENTATION, AND WHETHER NEGLIGENCE CAN CONSTITUTE SUCH A BREACH

The case also merits review because it appears to present issues that have not been addressed by this Court: What effect, if any, does a grievant's representation by attorneys have on union liability for breach of its duty of fair representation (Pet., at 18), and whether negligence can constitute a breach of that duty? (App. A, at 3a-4a.)

Petitioner has consistently maintained that the union's conduct involved more than mere negligence, and that its failure to submit exculpatory evidence and its refusal to call key witnesses is governed by a separate test – whether its conduct at arbitration contributed to the erroneous outcome under *Hines*, at 568. (Pet., at 9, 12.)

Nevertheless, while mere negligence on the part of a union generally will not constitute a breach of its duty of fair representation, some federal courts have held that an act or omission can be so "egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be deemed arbitrary." *Dutrisac v. Caterpillar Tractor Co.*, 511 F.Supp. 719 (1981), at 723, citing the Ninth Circuit opinion in *Robesky v. Qantas Empire Airways Ltd.*, 573 F.2d 1082 (9th Cir. 1978), at 1089-1090. (Pet., at 17.) Thus, the Third Circuit ruling is in conflict with that of the Ninth Circuit.

Respondents further submit that *Hines* is inapplicable on the "divergent facts" of this case, and that Petitioner failed to allege that the union's representation was arbitrary, discriminatory or in bad faith. (Resp. Opp. Br., at 4.)

First, the facts here are nearly indistinguishable from those in *Hines* and *Schoonover v. Consolidated Freightways Corp. of Delaware*, 147 F.3d 492 (6th Cir. 1998) (Pet., at 12.) And the complaint and other submissions contained sufficient facts from which bad faith could be inferred. In *Hill v. Aro Corporation*, 275 F. Supp. 482 (N..D. Ohio W.D. 1967), the plaintiff alleged, as here, that at the arbitration hearing, the union failed to produce evidence within its care, custody and control that would have supported the grievance. In the opinion of the District Court, the allegation was "that the union was more than merely

neutral at the hearing, but actually hostile to Plaintiff's position." *Id.*, at 491. The court added:

> "As this Court views the law, proof that the union actually worked against plaintiff at the arbitration hearing would be sufficient proof of bad faith under *Vaca v. Sipes,"* citing *Vaca*, 386 U.S. 171, 87 S. Ct. 903, 17 L.Ed.2d 842 (1967). *Id.*, at 490-491.

Finding that the main factual question was whether the union had acted in bad faith, the District Court said that it could not grant summary judgment to either side. *Id.*, at 491-492.

Here, Petitioner had argued on appeal that the union's representation was not vigorous and that there was evidence of bad faith in the complaint and other submissions (Pl. App. Br., at 18-19), i.e., the arbitrator's finding that the union did not submit any evidence and that he could give no weight to its presentation. (App. E, at 54a.) His opinion and award was evidence not only of bad faith, but proof that the union's conduct tainted the proceeding and contributed to the erroneous result. These facts were sufficient to show that Petitioner had stated a claim on which relief could be granted, and that the complaint should not have been dismissed. The written award also indicates that a great deal of time was taken up in discussion of irrelevant matters, such as the pay scale (*Id.*, 23a, 34a, 40a-41a) and an incident involving another employee. [1] (*Id.*, 32a, 45a-47a.)

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[1] The termination of that employee, Samir Michael, was the subject of a separate arbitration hearing.

Inasmuch as the arbitrator's opinion shows that nothing was accomplished for the Petitioner, it would follow that the arbitration was a sham.

Respondents argue that the Court of Appeals found that the Petitioner failed to allege that the arbitration was a sham and properly distinguished *Schoonover v. Consolidated Freightways Corp. of Delaware*, 147 F.3d 492 (6th Cir. 1998), where the arbitration lasted only 15 minutes. Respondents now state that here, the arbitration lasted three full days (Resp. Opp. Br., at 4; App. A, at 4a.) (Technically, the arbitration at issue lasted two and a half days.) However, it was never disputed that the union submitted no evidence at the arbitration. In their post-arbitration brief, Respondents themselves had argued this point (Pet., at 8; Pl. App. Br., at 18-19.) Accordingly, the arbitration was as much of a sham as those in *Hines* and *Schoonover*.

It isn't the duration of the arbitration hearing but whether it was genuinely adversarial that should determine whether it was a sham. It could be argued that if the union presented no evidence for Petitioner in the course of two and a half days of hearings, then her arbitration was even more of a sham than those in the cited cases. It means that it took place in form, but not in substance, and was therefore a sham, or imitation, and unreliable.

Respondents' remaining argument is that Petitioner cannot invoke this Court's exercise of certiorari jurisdiction to amend her complaint and that she should not be allowed to amend after "in essence" filing three complaints. (Resp. Opp. Br., at 7.) This is erroneous under *Czosek v. O'Mara*, 397 U.S. 25, 90 S.Ct. 770, 25 L.Ed.2d 25 (1970). (Pet., at 22.)

Respondents also inaccurately state that the question of amending the complaint was not raised below. The question of amending pleadings was raised and answered below. (Pet. App. Br., at 19; App. D, at 13a)

From the start, Respondents have maintained that the complaint was insufficient, but at the same time, they urge that Petitioner be denied the remedy for curing defective complaints. (Resp. Opp. Br., at 2-6-7) As the Supreme Court held in *Czosek v. O'Mara*, 397 U.S. 25, 27, 90 S. Ct. 770, 772, 25 L.Ed.2d 25 (1970), as "primary guardians of the duty of fair representation", courts should construe complaints to avoid dismissal and "at the very least" give plaintiffs the opportunity to file supplemental pleadings. (Pet. 22)

Respondents also make much of a prior complaint by Petitioner's former private counsel that was voluntarily dismissed by current counsel and has no bearing on the instant case. (Resp. Opp. Br., at 2-6-7.) Former counsel had filed but not served a federal action for defamation and other torts, Civil Action No. 99-3969.[2] Thereafter, Petitioner filed the instant complaint. But the two complaints were independent and unrelated, the former a tort action involving rights independent of the collective bargaining agreement, and the instant one arising under LMRA § 301. But LMRA § 301 does not pre-empt tort actions where non-negotiable rights are conferred by state law. The nature of the claim as independent of rights under the CBA is what determines whether it can go forward, not whether a grievance arising from the same set of facts can be pursued. *Livadas v. Bradshaw*, 512 U.S. 107, 114 S. Ct. 2068, 2077,

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[2] Current counsel voluntarily dismissed the first complaint when Respondents raised the untimeliness of the defamation claim.

Moreover, an employee can pursue more than one avenue of relief. For example, an employee can file an unfair labor charge with the National Labor Relations Board (NLRB) and an action under LMRA § 301, but the proceedings are separate and independent, and parties cannot play one forum against the other. *Arriaga-Zayas v. Ladies Garment* Workers, 825 F.2d 11 (1st Cir. 1987), at 13-14, citing *DelCostello v. International Brotherhood of Teamsters et. al.*, 462 U.S. 151, 1034 S. Ct. 2281, 76 L.Ed.2d. 476 (1983), at 170, 2294 (1983).

CONCLUSION

This case presents a serious divergence from long-established Supreme Court precedents consistently followed by other federal courts, and deprives employees of judicially created remedies when union conduct causes grievance mechanisms to fail. In the interests of uniformity in labor law, and because comparable issues will arise, Petitioner respectfully requests that this Court grant Certiorari to review these questions.

Respectfully submitted,

Margaret Kleinman
Counsel of Record
318 Anderson Street
Hackensack, N.J. 07601
(201) 342-7738

Attorney for Petitioner
Jesusa Morales